Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
Petitioners,
v.
AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
Petitioners,
v.
NORTOWN THEATRE, INC.,
Respondent.

SUPPLEMENTAL BRIEF AND REPLY BRIEF OF PETITIONERS

KERMIT G. BAILER
Corporation Counsel
JOHN E. CROSS
MAUREEN P. REILLY
VICTOR G. MARROCCO
Assistants Corporation Counsel
Attorneys for Petitioners
1010 City-County Building
Detroit, Michigan 48226
224-4557

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

TABLE OF CONTENTS

	Page
Index to Authorities	i
Supplemental Brief of Petitioners	1
Reply Brief	5
Conclusion	13

INDEX TO AUTHORITIES

Associated Press v. United States, 326 US 1, 89 L Ed 2013, 65 S Ct 1416, reh den, 326 US 802, 90 L Ed 489, 66 S Ct 6 (1945)	5
Cameron v. Johnson, 390 US 611, 20 L Ed 2d 182, 88 S Ct 1335 (1968)	6
Chaplinsky v. New Hampshire, 315 US 568, 86 L Ed 1031, 62 S Ct 766 (1942)	5
Cox v. Louisiana, 379 US 559, 85 S Ct 476, 13 L Ed 2d 487 (1965)	6, 7
Cox v. New Hampshire, 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396 (1941)	6
Erznoznik v. City of Jacksonville, — US — 45 L Ed 2d 125, (Decided June 23, 1975)	8, 12
Finer v. New York, 340 US 315, 95 L Ed 295, 71 S Ct 303 (1951)	5
Ginsberg v. State of New York, 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274, reh den, 391 US 971, 20 L Ed 2d 887, 88 S Ct 2029 (1968)	5

	Page
Interstate Circuit, Inc. v. Dallas, 390 US 676, 20 L Ed 2d 225, 88 S Ct 12 (1968)	5
Kingsley Books v. Brown, 354 US 436, 1 L Ed 2d 1469, 77 S Ct 1325 (1957)	11
Lehman v. City of Shaker Heights, 418 US 298, 304, 306-308 (1974)	9
Shuttlesworth v. Birmingham, 394 US 147 (1969)	9
Southeastern Promotions Ltd. v. Conrad, 420 US 546 (Decided March 18, 1975)	8, 9, 11, 12
Staub v. City of Baxley, 355 US 313 (1958)	9
106 Forsythe Corp. v. Bishop, No. 73-1176, Cert. den. June 23, 1975; 43 LW 3674	1, 3, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
Petitioners,
v.
AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
Petitioners,
v.
NORTOWN THEATRE, INC.,
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

This Supplemental Brief is submitted to bring to the attention of this Honorable Court its recent denial of certiorari in the case of *106 Forsythe Corp. v. Bishop,* No. 73-1176, the effect of which allows the ruling of the Federal Court of Appeals, 482 F 2d 280 (5th Cir 1973), and the District Court, 362 F Supp 1389 (Ga. 1972), to stand. Those decisions upheld ordinances enacted by the City Council of Athens, Georgia, similar to those challenged in the cases at bar, which classify "adult" motion picture theatres separate and apart from other theatres, require

them to be licensed, permit revocation of a license by the mayor for violation of the state obscenity law, and regulate by zoning the location of the adult theatres.

The District Court in Georgia rejected the argument by the theatre owner that the ordinances were violative of the Fourteenth Amendment, stating that the classification was not a denial of equal protection:

> "It ill befits plaintiff to question the legislative judgment that adult movie theatres are subject to zoning regulations and to being classified differently from ordinary movie theatres since plaintiff itself has resorted to classification by restricting exhibition to adults only. The legislature and Mayor and Council are going a short step further than plaintiff by restricting the locale in which the adult theatre can operate. The statute and the ordinance pursuant thereto did not prohibit the showing of adult movies; they only regulated the place of the showing. These legislative bodies may have, and doubtless did, conclude that these types of shows are undesirable in the prohibited locations in that (1) the type of clientele which may be attracted would be inimical to the best interests of the institutions and places sought to be protected, (2) although children are said to be barred they should be freed from the constant reminder that something is taking place in their midst which they must not see, and (3) there is always the possibility that self-imposed discipline may not be effective. Such reasoning has long been sufficient to justify zoning with respect to alcoholic beverages. Whatever the reasoning was, "debatable questions as to reasonableness are not for the courts but for the Legislature . . . ' *Goldblatt, supra,* 369 U.S. at 595, 82 S. Ct at 990. (at p. 1393)

The District Court further found that the licensing ordinance was " . . . not void for overbreadth, or for failing to provide standards to guide in the revocation, or for vagueness, or as imposing 'prior restraint', or as precluding the right of judicial review, or for any other reason alleged."

That decision was upheld by the Federal Court of Appeals, and will continue to be the law in the 5th Circuit, in view of the recent denial of certiorari by this Honorable Court.

In both cases at bar, the Petitioners successfully defended the Detroit ordinances regulating "adult" businesses by zoning and licensing in the District Court. The Sixth Circuit Court of Appeals consolidated the two cases and ruled, in a 2-1 decision, that the classification of "adult" theatres was violative of the equal protection clause of the Fourteenth Amendment, and invalidated Detroit's ordinances licensing and zoning "adult" theatres, bookstores and "topless" bars. That ruling is contrary to, and in conflict with, the 5th Circuit ruling in the *106 Forsythe* case, *supra.*

Petitioners respectfully submit that inasmuch as the United States Supreme Court has denied certiorari in the F*orsythe* case, allowing the 5th Circuit ruling to stand the Supreme Court should, if justice is to be served, grant certiorari to review the cases at bar. Otherwise, the City of Detroit will be placed in the inequitable position of be-

ing unable to protect its neighborhoods by effectively regulating "adult" businesses through licensing and zoning, while Athens, Georgia and other cities in the 5th Circuit will be free to enact the same type of regulatory ordinances without interference.

WHEREFORE, Petitioners respectfully request this Honorable Court to grant its Petition for Certiorari.

Respectfully submitted,

KERMIT G. BAILER
Corporation Counsel
JOHN E. CROSS
MAUREEN P. RIELLY
VICTOR G. MARROCCO
By: /s/ Maureen P. Reilly
Assistants Corporation Counsel
Attorneys for Petitioners,
1010 City-County Building
Detroit, Michigan 48226
224-4557

Dated: September 30, 1975.

REPLY BRIEF

Respondents claim, in their Brief in Opposition To Petition for Writ of Certiorari, that because the challenged ordinances which regulate "adult" businesses by zoning and licensing, classify such businesses on the basis of the content of the material disseminated, the classification is necessarily unconstitutional. The Respondents contend that all speech "which is presumptively protected by the First Amendment is fully protected, and this protective umbrella is not subject to qualification." It is Respondents' argument, apparently, that any material not declared legally obscene is protected by the First Amendment and may not be classified or regulated on the basis of its content, regardless of any extraneous factors. If Respondents' argument is carried to its logical conclusion, there could be no prohibition against speech which "threatens a clear and present danger of bringing about a substantial evil which the government has power to prohibit", *Associated Press v. United States,* 326 U.S. 1, 89 L Ed 2013, 65 S Ct 1416, *reh den.*, 326 US 802, 90 L Ed 489, 66 S Ct 6 (1945), there could be no prohibition of so-called "fighting words", those personally abusive epithets which, when addressed to the ordinary citizen, are a matter of common knowledge inherently likely to provide violent reaction, *Chapinsky v. New Hampshire,* 315 US 568, 86 L Ed 1031, 62 S Ct 766 (1942); *Finer v. New York,* 340 US 315, 95 L Ed 295, 71 S Ct 303 (1951); there could be no protection against "speech" deemed inimicable to certain segments of society, such as children, *Interstate Circuit, Inc. v. Dallas,* 390 US 676, 20 L Ed 2d 225, 88 S Ct 12 (1968); *Ginsberg v. State of New York,* 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274, *reh den.* 391 US 971, 20 L Ed 2d 887, 88 S Ct 2029 (1968); there

could be no regulation of speech intertwined with conduct, when the combination or "intertwining" of speech and conduct requires regulation in order to further a compelling state interest, and no other regulation will suffice, *Cameron v. Johnson,* 390 US 611, 20 LEd 2d 182, 88 S Ct 1335 (1968); *Cox v. New Hampshire,* 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396 (1941); *Cox v. Louisiana,* 379 US 559, 85 S Ct 476, 13 L Ed 2d 487 (1965).

In the *Cox v. Louisiana* case, *supra,* this Honorable Court found that a compelling state interest existed in protecting the administration of justice in the court system, and recognized a classification of a certain kind of picketing, i.e., picketing "with the intent of influencing the administration of justice", which classification dealt directly with the content of the message being conveyed by the picketers. This court upheld the prohibition against that tye of picketing only, in those locations where the disruptive message was interfering with the administration of justice. Similarly, in the case at bar, the City of Detroit has demonstrated a compelling state interest in the preservation and stabilization of its neighborhoods. This compelling state interest has been recognized both at the trial and appellate court levels. In a 2-1 decision, the Sixth Circuit Court of Appeals has ruled that, regardless of the deleterious effects caused to the surrounding neighborhoods by adult businesses, which adverse effects are not caused by non-adult businesses, the City cannot treat the two classes separately, if the regulation requires a classification based upon the *content* of the material disseminated. Petitioners respectfully submit that that was not, and is not, a correct interpretation and application of the First and Fourteenth Amendments to the United States Constitution, and is contrary to the ruling in *Cox v. Louisiana, supra.*

Respondents would have this Court hold that "adult" material may be disseminated under any circumstances, regardless of the adverse effects upon the surrounding community. The City's sole remedy, Respondents claim, is the invocation of the criminal process, and the citizens of the City of Detroit have no alternative but to sit back and allow the devastating effects of Respondents' commercial enterprises upon their homes and families, knowing full well that if, indeed, the material disseminated by these "adult" businesses are ultimately found to be legally obscene, the criminal convictions will not force the closure of the businesses nor protect the neighborhoods.

In *Cox v. Louisiana, supra,* this Honorable Court permitted a regulation of conduct intertwined with a certain classification of speech, in a certain location, when it was established that regulation of the particular kind of speech, i.e., that which affects the administration of justice, when intertwined with conduct, i.e., group demonstrations, in a particular location, i.e., at or near a courthouse, was necessary, and no more restrictive than necessary, to achieve a legitimate governmental interest. Petitioners respectfully submit that the challenged ordinances in the case at bar, similarly, regulate specific conduct, i.e., the establishment of adult businesses, which are classified according to the content of the material disseminated, i.e., material which is "distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas", which are defined as:

Specified Sexual Activities:

"1. Human Genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttocks or female breast.

Specified Anatomical Areas:

1. Less than completely and opaquely covered:
   (a) human genitals, pubic region,
   (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

The regulation is not a total prohibition, but precludes the establishment of "adult" businesses in certain *locations,* i.e., within 1,000 feet of any two other regulated uses, and within 500 feet of a residentially zoned district. Even these prohibitions may be waived under certain conditions. As noted by Judge Celebrezze, the ordinances are no more restrictive than necessary, and the alternative solutions posed by the majority are no real solutions at all.

Respondents, in their opposition brief, argue that the matter now pending before this Court has been decided by the recent decisions in *Erznoznik v. City of Jacksonville,* — US — ,45 L Ed 2d 125, decided June 23, 1975 and *Southeastern Promotions, Ltd. v. Conrad,* 420 US 546, decided March 18, 1975. In *Erznoznik,* the prohibition against the showing of nudity in drive-in theatres was held to be a violation of First Amendment Rights because there was no showing by the City of a compelling state interest, or that any adverse effects caused by the exhibition could not be avoided simply by "averting the eyes." That is not the situation in the case at bar. Both the trial and appellate courts recognized that the City has shown a compelling

state interest. The City has demonstrated the adverse effects caused by the establishment of "adult" businesses in Detroit and New York, which adverse effects cannot be avoided simply by "averting the eyes." The families, and the businesses which serve them, are the "captive audiences" of the deleterious effects caused by the location of "adult" businesses immediately adjacent to residential neighborhoods. This Court has recognized the City's responsibility to protect the interest of the "captive audience", and has upheld a refusal to accept political advertisements for display on City buses. *Lehman v. City of Shaker Heights,* 418 US 298, 304, 306-308 (1974).

In *Southeastern Promotions Ltd. v. Conrad, supra,* this Court held that the denial of the use of a municipal theatre for a production of "Hair", based solely on the board members' judgment of the musical's content, constituted an illegal prior restraint under a system lacking in constitutionally required minimal procedural safeguards. The official action in denying access to a public forum was likened to the censoring effect from the official actions, consistently identified as illegal prior restraints, in *Shuttlesworth v. Birmingham,* 394 US 147 (1969); *Staub v. City of Baxley,* 355 US 313 (1958), and others cited by the Court. All the cases had this in common: they gave public officials the power to deny use of a forum in advance of actual expression. In each of the cited cases, the prior restraint was embedded in the licensing system itself, operating without acceptable standards. In the *Southeastern Promotions* case, the Board's unbridled judgment effectively kept the musical off stage, even though there had been no determination that the musical was obscene, or that the producers were seeking to use a facility which was primarily serving a competing use, or that the production was not appropriate because of time, place, or manner of the presenta-

tion in relation to the nature of the facility or applications from other users, or that the rights of individuals in surrounding areas were violated, or that there was a captive audience.

In the case at bar, we are not considering a public forum where all are entitled to speak their piece. We are considering licensing and zoning laws in which the City Council, after careful investigation and evaluation, and a realistic appreciation of the impact of "adult" businesses from past experience in New York City and in the City of Detroit, determined that "adult" businesses should be regulated as to their location. The differing treatment afforded to "adult" businesses because of adverse effects directly attributable to them, but not to non-adult theatres, bookstores, or cabarets, was the same kind of treatment afforded other business classifications which were subjected to more restrictive zoning regulations as the detrimental aspects of the business increased. For example, a gasoline station would be permitted in most business districts, but the zoning restrictions become tighter when the gasoline stations expands to include a "tune-up" service, and even more restrictive when the automobile repair service provided expands from a typical "tune-up" to a fender repair and then to a complete overhaul or paint job. The classification in that instance is made, not because of the work performed per se, but because the adverse effects on the surrounding neighborhood becomes increasingly detrimental in direct relation to the kind of car service rendered by the gasoline station.

The standards or guidelines provided in the challenged zoning and licensing ordinances are not directed toward the dissemination of any particular piece of material. Although the Court of Appeals did not consider this issue,

the trial court did uphold the ordinances against the specific claims that they were vague, overbroad and in violation of the due process clause of the Fourteenth Amendment.

Respondents urge that this court apply the reasoning of *Southeastern Promotions, Ltd.*, to the case at bar, and find that the City's zoning and licensing regulations are an impermissible prior restraint. The term "prior restraint" requires close analysis and critical judgment in applying the thought behind the phrase. *Kingsley Books v. Brown*, 354 US 436, 1 L Ed 2d 1469, 77 S Ct 1325 (1957). In the case at bar, adult motion pictures are not prohibited. The regulations are addressed to the question "where" adult motion pictures should be exhibited; not to the question of "when," "what" or "how." The determination as to whether or not material is "adult" and subject to the zoning and licensing ordinances is subject to strictly and narrowly drawn provisions which can be easily and clearly understood by the average person. If, under the ordinances, the material is classified as "adult", it is not censored nor prohibited. An "adult" business once established, may disseminate "adult" material without any interference so long as it complies with the regulations applicable to every other theatre, bookstore or cabaret. The ordinances challenged here simply regulate the *location* of the "adult" businesses which seek to become established within the City, but do not interfere with any "adult" businesses established prior to their enactment. The regulations are not an impermissible prior restraint upon the Respondents' exercise of their First Amendment rights.

Petitioners respectfully submit that the competing interests of the "adult" commercial enterprises versus the City residents located in the same neighborhood; the "captive audience" aspect of those residents who are forced to

watch the decline of the neighborhood because of the infiltration of entrepreneurs who cater to the sexual whims of persons drawn primarily, if not entirely, from outside the neighborhood; the lack of censorship as to *what* material is disseminated; the limitation of the regulations as to *where* the material is disseminated; the recognition that the adverse effects caused by "adult" businesses are directly attributable only to the "adult" businesses, but not to similar businesses of a non-adult nature; are all factors which distinguish the case at bar from the holdings in *Erznoznik* and *Southeastern Productions, Ltd.*

Finally, as noted in the Supplemental Brief, submitted herewith, the City of Detroit will not have an effective means to protect its residential neighborhoods from the influx of adult businesses if the challenged ordinances are not upheld. At the same time, those cities within the jurisdiction of the Fifth Circuit Court of Appeals, by virtue of the recent denial of certiorari in *106 Forsythe Corp. v. Bishop*, cited in the Supplemental Brief, will be free to continue to enact regulatory provisions relating to "adult" businesses.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Honorable Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

KERMIT G. BAILER
Corporation Counsel
JOHN E. CROSS
MAUREEN P. REILLY
VICTOR G. MARROCCO
Assistants Corporation Counsel
By: /s/ Maureen P. Reilly
Attorneys for Petitioners
1010 City-County Building
Detroit, Michigan 48226
224-4557

Date: October 3, 1975.